

*a***KOK FOOK SANG****v.****JUTA VILA (M) SDN. BHD. & ORS.***b*

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
MAHADEV SHANKAR JCA
SHAIK DAUD ISMAIL JCA
[CIVIL APPEAL NO: A-02-767-95]
17 APRIL 1996

c

COMPANY LAW: Winding-up - Whether possible to appoint receiver in winding-up proceedings by Court

d

COMPANY LAW: Winding-up - Provisional liquidator - Circumstances in which Court will appoint provisional liquidator - Section 231 Companies Act 1965 - Issue of whether winding-up will be ordered - Approach to be taken by Court in determining whether winding-up order will be made - Whether there is good prima facie evidence that the company will be wound up

e

COMPANY LAW: Winding-up - Petition under s. 218(1) Companies Act 1965 - Just and equitable rule - Petition grounded on allegation that company was in substance an incorporated partnership - Whether ground sufficient - What must be shown to wind up partnership-like company

f

COMPANY LAW: Winding-up - Petition under s. 218(1) of the Companies Act 1965 - Whether necessary for petitioner to state specific ground relied on

g

COMPANY LAW: Winding-up - Petition - Whether creditor has right to appear at hearing of petition - Rule 28 of the Companies (Winding-up) Rules 1972

h

CIVIL PROCEDURE: Appeal - Adducing of fresh evidence - Whether fresh evidence could be admitted as of right - Circumstances in which fresh evidence could be admitted - Rule 7 of the Rules of Court of Appeal and s. 69 of the Courts of Judicature Act 1964

i

The appellant, the second respondent and the third respondent were shareholders and directors of the first respondent company. Due to differences between them, the appellant was subsequently removed as director. Before he was removed, the appellant filed a petition praying for an order directing the second and third respondents to purchase his shares in the company for RM2.82

million. Alternatively, the appellant prayed for an order directing the winding-up of the first defendant company. The petition also requested for the appointment of an interim receiver to prevent mismanagement of the assets of the company.

a

The application to wind up the company was indicated in the petition to be under s. 218(1) of the Companies Act 1965. The ground for this application, as contended by the appellant, is that he, the second respondent and the third respondent operated the company as if it were a partnership. As against this, the second and third respondents asserted that the company was not a partnership and that there are eight shareholders in the company. Further, it was stated that the appellant's alleged shareholding was being challenged in a separate suit and that in any case the appellant's shareholding amounted to only 4.08% of the total shares.

*b**c*

The application for the interim receiver, meanwhile, was made by a summons in chambers with a supporting affidavit. The Judicial Commissioner, however, dismissed this interim application and consequently, the appellant now appeals against this refusal.

d

Before the hearing of this appeal, the appellant applied to admit fresh evidence to support his contention that the Judicial Commissioner had erred in refusing to appoint an interim receiver. Pursuant to this, Counsel for the appellant submitted that by virtue of r. 7 of the Rules of the Court of Appeal 1994, the fresh evidence may be admitted as of right. The evidence sought to be admitted was that 2 cheques of the company, which were given to the company's contractor and in respect of which the contractor had issued 2 receipts, had in actual fact been used for the second and third respondents' personal purposes. Based on this, Counsel for the appellant invited the Court to infer that monies were being embezzled and that unless an interim receiver was appointed, the company's money would continue to be embezzled.

*e**f*

The Court had to decide whether the fresh evidence adduced by the appellant may be admitted and whether the Judicial Commissioner was wrong in refusing to appoint an interim receiver and manager.

g

Held:

Per Mahadev Shankar JCA

h

[1] It is not possible to appoint a receiver in winding-up proceedings by the Court. In a winding-up proceedings by the Court, s. 231 of the Companies Act 1965 provides for the appointment of a provisional liquidator. Therefore, where it is desired to protect a company from the attentions of its directors in a winding-up proceedings, the proper course would be to apply for the appointment of a provisional liquidator.

i

- a* [2] A Court will not appoint a provisional liquidator upon the presentation of a winding-up petition unless there is good *prima facie* evidence that the company will be wound up because the company is obviously insolvent or the company's assets are in jeopardy or there are other circumstances which make it imperative for the Court to intervene.
- b* [3] In determining whether a winding-up order will be made, the Court should first look to the sufficiency of the allegations in the petition. The primary facts set out in the petition, if assumed to be true, and the uncontested evidence, taken as a whole, must add up to the conclusion that it is imperative that the winding-up order be made.
- c* [4] Where a company is in substance an incorporated partnership, a winding-up order may be made under the just and equitable rule in situations where a partnership may be dissolved by the Court. Therefore, the mere fact that a company is in substance an incorporated partnership is not enough.
- d* There must be something more. There must be shown situations which will enable the winding-up Court to exercise its equitable jurisdiction to order the partnership-like company to be wound up. In the present case, there were no such situations shown. There merely was an allegation that the company was in substance an incorporated partnership.
- e* [5] The primary facts alleged in the petition in the present case fall far short of the *prima facie* case required to support a conclusion that the company will be wound up. Mere apprehensions of mismanagement are not enough. There was no uncontested evidence on which it could be said that the appointment of an interim receiver was in any way justified. Therefore,
- f* this Court opines that on the evidence before him, the Judicial Commissioner correctly dismissed the application.
- [6] Where a petitioner presents a petition to wind up a company under s. 218(1) of the Companies Act 1965, it is incumbent upon him to state which of these grounds he is relying upon and not ask the Court to search
- g* his petition for facts which may be thought capable of being slotted into some particular sub-section.
- [7] The inference that Counsel for the appellants invited the Court to draw from the fresh evidence (i.e. that unless the interim receiver was appointed, company's money would continue to be embezzled) is a *non-sequitur* as
- h* there was absolutely no evidence to indicate that the company's contractor was not a genuine creditor or that the receipts given by the contractor were not a good discharge of the payments made. Without proof that the receipts were not genuine, this evidence is irrelevant.
- i* [8] Rule 7 of the Rules of the Court of Appeal 1994 and s. 69 of the Courts of Judicature Act 1964 are identically worded and these are the relevant provisions for the reception of further or fresh evidence. By s. 69(2) of

the Courts of Judicature Act 1964, further evidence may be admitted without leave on interlocutory applications or where the further evidence involves matters that had occurred subsequent to the decision from which the appeal is brought. This being the case, the Court disagrees that s. 69(2) applies because neither is this an interlocutory application nor did the new evidence relate to matters which occurred after the decision of the Judicial Commissioner.

- [9] Where the further evidence does not fall within sub-section 2, then by virtue of s. 69(3) of the Courts of Judicature Act 1964, further evidence can be admitted only on special grounds and with the leave of the Court of Appeal. Section 69(3) relates to appeals from a judgment in the Court below after a trial or hearing on the merits. The commentary in the 1 *Supreme Court Practice* 1995 paras. 59/10/8 and 59/10/9 states that the new evidence will not be admitted unless the *Ladd v. Marshall* conditions are satisfied. In the present case, the appellant does not satisfy the *Ladd v. Marshall* conditions because he was in possession of the 'new' evidence before the petition was filed. In any case, the conduct of the appellant has been such that if the admission of the new evidence was a matter of discretion only, this Court would have exercised it against him.

Per Curiam:

- [1] In a winding-up petition, a creditor has a right to appear at the hearing of the petition by virtue of r. 28 of the Companies (Winding-up) Rules 1972.

[Appeal dismissed; application to admit fresh evidence disallowed.]

[Bahasa Malaysia Translation of Headnotes]

UNDANG-UNDANG SYARIKAT: Penggulangan - Samada boleh melantik penerima dalam prosiding penggulangan oleh Mahkamah

UNDANG-UNDANG SYARIKAT: Penggulangan - Penyelesai sementara - Keadaan dalam mana Mahkamah akan melantik penyelesai sementara - Seksyen 231 Akta Syarikat 1965 - Isu samada penggulangan akan diperintahkan - Pendekatan yang patut diambil oleh Mahkamah dalam menentukan samada perintah penggulangan akan dibuat - Samada terdapat keterangan prima facie yang baik bahawa syarikat akan digulung

- a** *UNDANG-UNDANG SYARIKAT: Penggulangan - Petisyen di bawah s. 218 Akta Syarikat 1965 - Kaedah yang adil dan saksama - Petisyen diasaskan atas dakwaan bahawa syarikat adalah pada hakikatnya suatu perkongsian yang diperbadankan - Samada alasan memadai - Apakah yang mesti ditunjukkan untuk menggulangan syarikat seakan perkongsian*
- b** *UNDANG-UNDANG SYARIKAT: Penggulangan - Petisyen di bawah s. 218(l) Akta Syarikat 1965 - Samada perlu bagi pempetisyen untuk menyatakan alasan khusus kepada mana ianya bergantung*
- c** *UNDANG-UNDANG SYARIKAT: Penggulangan - Petisyen - Samada pemiutang mempunyai hak untuk hadir di perbicaraan petisyen - Kaedah 28 Kaedah-kaedah (Penggulangan) Syarikat 1972*
- d** *PROSEDUR SIVIL: Rayuan - Mengemukakan keterangan baru - Samada keterangan baru boleh dimasukkan sebagai satu hak - Keadaan dalam mana keterangan baru boleh diterima masuk - Kaedah 7 Kaedah-kaedah Mahkamah Rayuan dan s. 69 Akta Mahkamah Kehakiman 1964*
- e** Perayu, responden kedua dan responden ketiga adalah pemegang-pemegang saham dan pengarah-pengarah dalam syarikat responden pertama. Disebabkan perbalahan di antara mereka, perayu telah berikutan itu disingkirkan daripada menjadi seorang pengarah. Sebelum beliau disingkirkan, perayu telah memfailkan satu petisyen memohon satu perintah untuk mengarah responden-responden kedua dan ketiga untuk membeli saham-sahamnya dalam syarikat tersebut pada nilai sebanyak RM2.82 juta. Secara alternatifnya, perayu juga memohon untuk
- f** mendapatkan perintah mengarahkan penggulangan syarikat responden pertama. Petisyen tersebut juga memohon perlantikan penerima interim bagi mencegah salah-urusan akan aset-aset syarikat tersebut.
- g** Permohonan untuk menggulang syarikat tersebut telah dinyatakan dalam petisyen sebagai telah dibuat di bawah s. 218(1) Akta Syarikat 1965. Alasan permohonan ini, sepertimana yang ditegaskan oleh perayu, adalah bahawa beliau, responden kedua dan responden ketiga telah mengendalikan syarikat tersebut seolah-olah ianya sebuah perkongsian. Bertentangan dengan hal ini, responden kedua dan ketiga menegaskan bahawa syarikat tersebut bukannya sebuah perkongsian dan bahawa terdapat lapan pemegang saham dalam syarikat tersebut. Selanjutnya,
- h** telah dinyatakan bahawa pemegangan saham perayu telah dicabar dalam satu guaman yang berasingan dan bahawa dalam apa keadaan pun, pemegangan saham perayu hanyalah 4.08% sahaja dari keseluruhan saham-saham.
- i** Sementara itu, permohonan untuk penerima interim telah dibuat oleh satu saman dalam kamar dengan afidavit sokongan. Pesuruhjaya Kehakiman namun begitu, telah menolak permohonan ini dan akibatnya, perayu kini merayu terhadap penolakan tersebut.

Sebelum perbicaraan rayuan ini, perayu telah memohon untuk memasukkan keterangan baru bagi menyokong penegasannya bahawa Pesuruhjaya Kehakiman telah tersalah pertimbangan dalam menolak untuk melantik penerima interim. Selaras dengan ini, Peguam bagi pihak perayu berhujah bahawa menurut k. 7 Kaedah-kaedah Mahkamah Rayuan 1994, keterangan baru tersebut boleh dimasukkan sebagai suatu hak. Keterangan yang dipohon untuk dimasukkan adalah bahawa dua cek syarikat tersebut, yang telah diberikan kepada kontraktor syarikat dan berhubung dengan yang mana kontraktor tersebut telah mengeluarkan dua resit, telah pada hakikat sebenarnya digunakan bagi tujuan-tujuan persandirian responden-responden kedua dan ketiga. Berdasarkan perkara ini, Peguam bagi pihak perayu menjemput Mahkamah untuk membuat kesimpulan bahawa wang sedang digelapkan dan jika penerima interim tidak dilantik, wang syarikat tersebut akan berterusan digelapkan.

*a**b**c*

Di hadapan Mahkamah isu yang harus diputuskan ialah samada keterangan baru yang hendak dikemukakan oleh perayu di atas boleh diterima masuk dan sama Pesuruhjaya Kehakiman salah kerana enggan untuk melantik penerima dan pengurus interim.

*d***Diputuskan:****Oleh Mahadev Shankar HMR**

[1] Seorang penerima tidak mungkin dapat dilantik dalam prosiding penggulungan oleh Mahkamah. Dalam prosiding penggulungan oleh Mahkamah, s. 231 Akta Syarikat 1965 memperuntukan perlantikan penyelesaian sementara. Dengan itu, di mana ianya perlu untuk melindungi sesebuah syarikat daripada perhatian pengarah-pengarahnya dalam sesuatu prosiding penggulungan, jalan yang wajar adalah untuk memohon bagi perlantikan penyelesaian sementara.

*e**f*

[2] Mahkamah tidak akan melantik penyelesaian sementara setelah pengemukaan petisyen penggulungan kecuali terdapat keterangan *prima facie* yang baik bahawa syarikat akan digulung kerana syarikat tersebut ketara insolvent atau aset-aset syarikat itu berada dalam keadaan yang memudaratkan atau terdapat keadaan-keadaan yang menjadikannya sangat mustahak bagi Mahkamah mencelah.

g

[3] Dalam menentukan samada perintah penggulungan boleh dibuat, Mahkamah akan pertamanya melihatsamada pengataan-pengataan dalam petisyen tersebut memadai atau pun tidak. Fakta-fakta penting yang dibentangkan dalam petisyen tersebut, jika dianggap benar, dan keterangan yang tidak dicabar, diterima secara keseluruhannya, mestilah membawa kepada keputusan bahawa ianya sangat mustahak untuk membuat perintah penggulungan yang dipohon itu.

*h**i*

- a* [4] Di mana sesebuah syarikat adalah pada hakikatnya adalah sebuah perkongsian yang diperbadankan, suatu perintah penggulungan boleh dibuat di bawah kaedah yang adil dan saksama berdasarkan situasi di mana sesuatu perkongsian boleh dibubarkan oleh Mahkamah. Dengan itu hakikat bahawa sesebuah syarikat itu adalah pada hakikatnya suatu perkongsian yang diperbadankan adalah tidak memadai. Haruslah terdapat sesuatu yang lebih daripada itu. Haruslah terdapat situasi yang akan membolehkan Mahkamah penggulungan melaksanakan bidangkuasa saksamanya untuk memerintahkan supaya syarikat yang seakan syarikat perkongsian itu digulung. Dalam kes semasa, ini, situasi-situasi yang sedemikian tidak ditunjukkan. Hanya terdapat pengataan bahawa syarikat tersebut adalah menurut substans sebuah perkongsian yang diperbadankan.
- b*
- c*
- d* [5] Fakta-fakta penting yang dikatakan dalam petisyen kes semasa ini jauh dari memenuhi kes *prima facie* yang diperlukan untuk menyokong satu kesimpulan bahawa syarikat tersebut perlu digulung. Tanggapan semata-mata mengenai salah-urusan tidak mencukupi. Tidak terdapat keterangan yang tidak dicabar di atas mana ianya boleh dikatakan bahawa perlantikan penerima interim adalah wajar. Oleh itu, Mahkamah ini berpendapat bahawa berdasarkan keterangan yang terdapat dihadapannya, Pesuruhjaya Kehakiman telah dengan betulnya menolak permohonan di hadapannya.
- e*
- f* [6] Di mana seseorang pempetisyen mengemukakan satu petisyen untuk menggulung sebuah syarikat di bawah s. 218(l) Akta Syarikat 1965, adalah baginya menyatakan atas alasan yang manakah ia bergantung dan bukannya meminta Mahkamah memeriksa petisyennya bagi mendapatkan fakta-fakta yang difikir boleh diselitkan ke dalam mana-mana seksyen kecil yang tertentu.
- g* [7] Inferens yang dimohon oleh Peguam bagi pihak perayu supaya dibuat oleh Mahkamah (iaitu bahawa melainkan penerima interim dilantik, wang syarikat akan terus digelapkan) adalah satu *non-sequitur* kerana secara muktamadnya tidak terdapat keterangan bagi menunjukkan bahawa kontraktor syarikat tersebut bukannya merupakan pemiutang yang sebenarnya atau bahawa resit-resit yang diberikan oleh kontraktor tersebut bukannya merupakan pembayaran yang sebenarnya. Tanpa bukti bahawa resit tersebut bukannya resit sebenar, keterangan ini adalah tak relevan.
- h*
- i* [8] Kaedah 7 Kaedah-kaedah Mahkamah Rayuan 1994 dan s. 69 Akta Mahkamah Kehakiman 1994 mempunyai susunan kata yang sama dan ini adalah peruntukan-peruntukan yang relevan bagi penerimaan keterangan yang selanjutnya atau yang baru. Melalui s. 69(2) Akta Mahkamah Kehakiman 1964, keterangan yang seterusnya boleh diterima masuk tanpa kebenaran atas permohonan-permohonan interlokutori atau di mana keterangan yang selanjutnya itu melibatkan perkara-perkara yang berlaku selepas keputusan yang dirayu itu dibuat. Dalam keadaan ini, Mahkamah

tidak bersetuju bahawa s. 69(2) terpakai kerana ini bukannya merupakan permohonan interlokutori dan keterangan baru tersebut tidak mempunyai kaitan dengan perkara-perkara yang berlaku selepas keputusan Pesuruhjaya Kehakiman.

- [9] Di mana keterangan seterusnya tidak terlingkung di dalam seksyen-kecil 2, maka menurut s. 69(3) Akta Mahkamah Kehakiman 1964, keterangan selanjutnya boleh diterima-masuk hanya atas alasan-alasan khas dan dengan kebenaran Mahkamah Rayuan. Seksyen 69(3) berkaitan dengan rayuan-rayuan daripada penghakiman dalam Mahkamah di bawah selepas sesuatu perbicaraan atau pembicaraan atas merit. Ulasan dalam 1 Amalan Mahkamah Agung 1995 perenggan-perenggan 59/10/8 dan 59/10/9 menyatakan bahawa keterangan baru tidak akan diterima masuk melainkan syarat-syarat *Ladd v. Marshall* dipenuhi. Dalam kes semasa ini, perayu tidak memenuhi syarat-syarat *Ladd v. Marshall* kerana beliau memiliki keterangan baru tersebut sebelum petisyen difailkan. Dalam apa keadaan pun, kelakuan perayu adalah sedemikian rupa hinggakan jika kemasukan keterangan baru adalah merupakan suatu perkara budibicara sahaja, Mahkamah ini tentu akan melaksanakannya dengan cara yang tidak berpihak kepada beliau.

Per curiam:

- [1] Dalam sesuatu petisyen penggulungan, pemiutang berhak untuk hadir di perbicaraan petisyen tersebut menurut k. 28 Kaedah-kaedah (Penggulungan) Syarikat 1972.

[Rayuan ditolak; permohonan untuk menerima masuk keterangan baru tidak dibenarkan.]

Cases referred to:

Ebrahimi v. Westbourne Galleries Ltd. & Ors. [1973] AC 360 (foll)
Highfield Commodities Ltd, Re [1984] 3 All ER 884; [1985] 1 WLR 149 (foll)
Ladd v. Marshall [1954] 3 All ER 745; 1 WLR 1489 (refd)
Loch & Anor. v. John Blackwood Ltd. [1924] AC 783 (refd)
Saul D Harrison & Sons, Re [1994] BCC 162 (refd)
Tay Bok Choon v. Tahansan Sdn. Bhd. [1987] 1 MLJ 433 (refd)
Tuan Hj. Ishak bin Ismail v. Leong Hup Holdings Bhd. and Ors. [1996] 1 MLJ 661 (foll)
Wondoflex Textiles Pty. Ltd., Re [1951] VLR 458 (refd)
Yenidje Tobacco Co. Ltd., Re [1916] 2 Ch 426 (refd)

Legislation referred to:

Companies Act 1965, s. 231
 Companies (Winding-up) Rules 1972, r. 28

- a* Courts of Judicature Act 1964, s. 69
Rules of the Court of Appeal 1994, r. 7

Other sources referred to:

Company Law, Walter Woon, p. 497
Halsbury's Laws of England, 4th Edn., para. 1490 note 3

- b* For the appellant - *Hira Singh (T. Gunaseelan with him); M/s. Asbir, Hira Singh & Co.*
For the respondent - *A Iruthaya Raj; M/s. Raj Selva & Co.*

JUDGMENT

- c* **Mahadev Shankar JCA:**

This appeal against the refusal of the learned judicial commissioner to appoint an interim receiver and manager. Before the hearing of this appeal proper, the appellant applied to us to admit fresh evidence to support his contention that the judicial commissioner was wrong and that the appointment should have been made. We dismissed this application, and we also dismissed the appeal. Our decision to do so was unanimous. Our reasons now follow.

- d*
- e* Mr. Hira Singh is wrong to ask for the appointment of a receiver and manager as in our view it is not possible to appoint a receiver in winding-up proceedings by the Court. In the case of a winding-up proceeding by the Court, there is provision in s. 231 of the Companies Act 1965 ('the Act') for a provisional liquidator to be appointed. See also *Company Law* by Walter Woon at p. 497 where it says:

- f* In the case of a winding-up by the Court there is always a *hiatus* between the presentation of the petition and the making of the winding-up order. Many things might happen in the interim. To preserve the *status quo*, the Court may appoint the official receiver or an approved liquidator as provisional liquidator at any time after the presentation of a petition. Any creditor or contributory may apply for the appointment of a provisional liquidator.

- g* and at p. 498:

- h* The provisional liquidator's primary duty is to preserve the *status quo* pending the Court's final determination whether or not the company should be wound up. The object of the appointment of a provisional liquidator is to keep things in *status quo* and to prevent any creditor obtaining priority. For this reason he usually does not have the power to sell and distribute the company's assets, unless that power is given to him specifically. The provisional liquidator may exercise all the powers of a liquidator, subject however to such limitations and restrictions as may be set in the order appointing him. Upon the appointment of a provisional liquidator, the powers of the directors to act as such are determined, although they retain residual powers to oppose the winding-up
- i*

petition when it comes for hearing. The provisional liquidator may request the appointment of a special manager to assist in running the business of the company. The directors of the company may be appointed special managers. a

The case referred to by Mr. Hira Singh, i.e. *Re Highfield Commodities Ltd.* [1984] 3 All ER 884; [1985] 1 WLR 149 is a case which concerns the appointment of a provisional liquidator. Therefore, where it is desired in a winding-up proceeding to protect a company from the attention of its directors, the proper course would be to apply for the appointment of a provisional liquidator. b

But a Court will not appoint a provisional liquidator consequent upon the presentation of a winding-up petition unless there is good *prima facie* evidence that the company will be wound up because the company is obviously insolvent, or the company's assets are in jeopardy, or there are other circumstances which make it imperative for the Court to intervene: See *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 and 7(2) *Halsbury's Laws of England* (4th Ed) para 1490 note 3. c
d

In determining whether a winding-up order will be made, the Court should first look to the sufficiency of the allegations in the petition. Reference may be made in this context to what was said in *Tuan Hj. Ishak bin Ismail v. Leong Hup Holdings Bhd. and Ors.* [1996] 1 MLJ 661 at pp. 678H-681B. The primary facts set out in the petition if assumed to be true and the uncontested evidence taken as a whole must add up to the conclusion that it is imperative that the winding-up order be made. e

Kok Fook Sang ('Kok') filed his petition on 21 September 1995. The heading indicates this to be a petition under s. 218(1) of the Act. This subsection contains 11 separate and independent grounds why a winding-up order may be made. It is incumbent upon a petitioner to state which of these grounds he is relying upon and not ask the Court to search his petition for facts which may be thought capable of being slotted into some particular sub-section. f

Since the Court was concerned here with Juta Vila (M) Sdn. Bhd. ('Juta'), the allegations Kok has made in the petition with regard to his problems with some other businesses called Firenze Enterprise, Plus Parade Sdn. Bhd. and Globeplex (M) Sdn. Bhd., were irrelevant. g

The petition avers that the company has four shareholders, namely, the petitioner, Kok Kim Sang (the petitioner's nominee), the second and the third respondents. The petitioner was also a director of the company until his removal as director on 13 August 1995. Paragraph 7 of the petition states: h

7. In essence your petitioner, the second and third respondents were the beneficial owners of all the shares in the company and operated the company as though it was a partnership. i

- a* In *Ebrahimi v. Westbourne Galleries Ltd. & Ors.* [1973] AC 360 at p. 379 Lord Wilberforce said:

Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles.

b

There must be something more. There must be shown situations which will enable the winding-up Court to exercise its equitable jurisdiction to order the company to be wound up. This is how it was put by Lord Wilberforce (at p. 379):

c

The superimposition of equitable considerations requires something more, which typically may include one or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

d

e

For instance, if there was a deadlock in the management of the company (which was in substance a partnership) because the members or directors did not get along: see *Re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch 426. Similarly, where the petitioner in a partnership like company had been deliberately excluded from the management of the company where there was an agreement

f

or undertaking (*Re Westbourne Galleries Ltd* [1973] AC 360) or a mutual expectation (*Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 MLJ 433) that he would be allowed to participate in managing the company. Also, where the minority members of a partnership-like company have lost confidence in the directors because of their lack of probity in the conduct of the company's

g

affairs: see *Loch & Anor. v. John Blackwood Ltd.* [1924] AC 783 where it was accepted by Lord Shaw that the object of the directors was to keep the petitioners in ignorance so as to acquire their shares at an under value, and *Re Wondoflex Textiles Pty. Ltd.* [1951] VLR 458 where those in control of the company tried to squeeze a minority member out of the company with the object of making his position intolerable.

h

Put shortly, what it means is this, where a company is in substance an incorporated partnership, a winding-up order may be made (under the just and equitable rule) in situations where a partnership may be dissolved by the Court. But where the company is not in substance an incorporated partnership, such situations are no longer grounds for a winding-up order to be made under the rule as the use of the partnership analogy is no longer valid.

i

In the instant case, the petitioner asks for the company to be wound up merely because it is in substance an incorporated partnership. But that is not enough. For a winding-up order under the just and equitable rule to be made, in the case of a partnership-like company, there must be shown situations where a partnership may be dissolved by the Court. None are shown in the petition. *a*

Juta was incorporated on 21 November 1991. The authorized capital was RM5m. The issued capital was RM1,857,000. Kok claims in the petition that he held 75,710 shares in his own name and that one Kok Kim Sang held 68,050 shares as his nominee. He also claims that he, the second respondent ('Yeoh') and the third respondent ('Chin') operated the company as if it were a partnership. *b*

Yeoh and Chin have challenged these allegations. They say the company is not a partnership, that there are eight shareholders, and that Kok's alleged beneficial shareholding in Juta is under challenge in Ipoh High Court Sivil Suit No. 22-115-94. In any case, his 75,710 shares only gives him a nominal 4.08% of Juta. *c*

From the date of its incorporation until 22 September 1995, Kok was director of Juta, whose sole business appears to have been the completion of a housing project in Cameron Highlands. Yeoh was also a director of Juta. Evidently there were differences between the directors and the articles of association of Juta permitted the removal of a director by majority vote. *d*

This is what happened on 12 May 1994. Yeoh was unseated. His response was to file a petition No: 28-41-94 challenging his removal. Kok and Chin were cited as defendants. The parties came to a compromise. Kok and Chin agreed to buy Yeoh out at RM3.5 million, and the petition was not proceeded with. Chin alone signed the agreement and paid RM1.5 million as deposit. Kok was to buy ½ of Yeoh's shares from Chin but he reneged. So Yeoh forfeited the deposit, and with Chin's concurrence, Yeoh was reappointed to the board of Juta on 14 August 1995 at an extraordinary general meeting of which due notice had been given to all the shareholders but Kok did not attend. *e*

Kok's petition was filed just over a month after Yeoh's reappointment on 14 August 1995. It is evident from the petition that Kok wanted Yeoh and/or Chin to buy him out at RM2.82 million but they have declined to do so at this price. A notice for another extraordinary general meeting was given for 22 September 1995 to remove Kok as director. He attended the meeting and voted against it but the resolution was carried out. *f*

This petition which was filed the previous day, is not under s. 181 of the Act. But the very first prayer is that the Court order Yeoh and Chin to purchase his shares at RM2.82 million. The winding-up order was only sought by way of an alternative. The petition also set out a prayer for an interim receiver 'to prevent mismanagement of the assets of the company' and in the further *g*

This petition which was filed the previous day, is not under s. 181 of the Act. But the very first prayer is that the Court order Yeoh and Chin to purchase his shares at RM2.82 million. The winding-up order was only sought by way of an alternative. The petition also set out a prayer for an interim receiver 'to prevent mismanagement of the assets of the company' and in the further *h*

This petition which was filed the previous day, is not under s. 181 of the Act. But the very first prayer is that the Court order Yeoh and Chin to purchase his shares at RM2.82 million. The winding-up order was only sought by way of an alternative. The petition also set out a prayer for an interim receiver 'to prevent mismanagement of the assets of the company' and in the further *i*

- a* alternative that the Court should appoint Kok to be a joint signatory of all cheques issued by the company.

b Kok completely cut the ground from under his own feet, because his objective was not the winding-up of the company at all but a mandatory direction to compel the other shareholders to buy him out at RM2.82 million and carry on with the company as a going concern. No legal or factual basis was shown as to how or why this Court would ever make such an order.

c The application for the interim receiver was made by a summons in chambers filed on 5 October 1995 with a supporting affidavit of the same date. The primary facts alleged in the petition fall far short of the *prima facie* case required to support a conclusion that the company should be wound up. The facts alleged in the supporting affidavit did not take the matter any further. Until the day this petition was filed, Kok was an active director of this company, a co-signatory of all cheques, and a person who had full legal responsibility for the management and affairs of Juta. Mere apprehensions of mismanagement are not enough. Kok was very much an interested party with a purpose to serve and all his material allegations were challenged with the result that there was no uncontested evidence on which it could be said that the appointment of an interim receiver was in any way justified. On the evidence before him, we think the learned judicial commissioner came to the correct decision on 25 October 1995 when he dismissed the application with costs.

f We now turn to the motion which was filed before us to admit fresh evidence. After dismissal of their interim application on 25 October 1995, Kok's solicitors embarked on proceedings for discovery and obtained orders permitting them to inspect the cheques and accounts of Juta's bankers. Kok himself, whilst he was still a director of the company, made copies of some of the company's documents which he thought would come in useful in furthering his battles with Yeoh. The accusations he chose to make based on these documents and material arising out of discovery proceedings were engrossed into an affidavit which he affirmed on 27 March 1996. His solicitors then filed a formal application on 28 March 1996 for leave to read this affidavit at the hearing of this appeal, which was listed for disposal on 15 April 1996.

g Kok's Counsel, Mr. Hira Singh submitted that he was entitled to put in this fresh evidence without leave and as a matter of right. He relied on r. 7 of the Rules of the Court of Appeal 1994. Section 69 of the Courts of Judicature Act 1964 ('the Courts of Judicature Act') is identically worded.

h The evidence in question was this. On 25 November 1992, Yeoh and Chin had signed a cash cheque for RM200,000 drawn on Juta's account with Malayan Banking Bhd. This money was said to be for payment to a contractor of Juta named Soonly Fatt Construction and Trading ('Soonly'). The cheque

number was MBB 072791. Soonly issued a formal receipt for this cheque in favour of Juta. The cheque was subsequently used by Yeoh to pay a loan taken by him from one Lee Nyan Hon on 8 September 1992. The cheque was paid into Lee Nyan Hon's account. A second cheque dated 25 November 1992 for RM60,000 cash on Juta's account with Public Bank Bhd was signed by Yeoh and Chin. The cheque number is 044388. An official receipt for this cheque was issued by Soonly the same day. The reverse of the cheque is said to show that it was paid into Yeoh's personal account.

Mr. Hira Singh invited us to infer from this that Yeoh had been embezzling this money, and that unless the interim receiver was appointed the embezzling would continue. With the greatest respect, this was a *non-sequitur*. There was absolutely no evidence before us that Soonly was not a genuine creditor, and that the receipts given by Soonly were not good discharge to Juta to the extent of these payments. Copies of the receipts and cheques in question had been in Kok's possession before this petition was filed.

Section 69(1), (2) and (3) of the Courts of Judicature Act, read as follows:

69 Hearing of appeals

- (1) Appeals to the [Court of Appeal] shall by way re-hearing, and in relation such appeals the [Court of Appeal] shall have all the powers and duties, as to amendment or otherwise, of the High Court, together full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner.
- (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after date of the decision from which the appeal is brought.
- (3) Upon appeals from a judgment, after trial or hearing of any case or, matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the [Court of Appeal].

We do not agree with Mr. Hira Singh that s. 69(2) applies to this case because we are not concerned here with an interlocutory application. Nor does the second limb of s. 69(2) apply because the new evidence sought to be adduced related to matters which occurred in 1992.

Section 69(3) relates to appeal from a judgment in the Court below after a trial or hearing on the merits. The commentary in the 1 *Supreme Court Practice* 1995 paras 59/10/8 and 59/10/9 at p. 996 states that the new evidence will not be admitted unless the *Ladd v. Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489 conditions are satisfied. The High Court dismissed the application to appoint the interim receiver after a hearing on the merits. The appellant did not satisfy the *Ladd v. Marshall* conditions because he was in possession of the 'new' evidence before the petition was filed. In any event, without proof

- a* that the Soonly receipts were not genuine, the evidence was irrelevant. Yeoh was not the only shareholder of Juta. If Juta had a right of resource against him for these moneys (and there is nothing to suggest that), it does not mean Juta has to be wound up. In any case, the conduct of the appellant has been such that if the admission of the new evidence was a matter of discretion
- b* only we would still have exercised it against him.

- A collateral point which arose in this appeal was Mr. Hira Singh's objection to the *locus standi* of Mr. Chee who went on record as Counsel for Public Bank. In a winding-up petition, a creditor has a right to appear at the hearing of the petition: see r. 28 of the Companies (Winding-up) Rules 1972. The bank
- c* was made subject to discovery proceedings in the High Court. The remarks of Hoffman LJ in the *Re Saul D Harrison & Sons* [1994] BCC 162 at p. 179 whether a party should be permitted to fish for adverse material, in the absence of any specific allegations in the petition itself may be of some interest here. However since we have dismissed this appeal in favour of the
- d* bank, we think that the necessity for the bank to be added as a co-defendant had best be ventilated in the Court below if it wishes to participate in this litigation, or for that matter, if the petitioner wishes to obtain orders which directly affects the bank's interests.

Reported by S. Dharmendran

e

f

g

h

i